

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARTHA E. ANDERSON

Claimant

VS.

FOOTLOCKER

Respondent

AND

AMERICAN CASUALTY CO. OF READING, PA

Insurance Carrier

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Docket No. 1,017,857

ORDER

Respondent and its insurance carrier appealed the June 29, 2005, Award entered by Administrative Law Judge Bryce D. Benedict. On October 18, 2005, the Board heard oral argument in Topeka, Kansas.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for claimant. Michael P. Bandre of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a December 23, 2003, accidental injury to claimant's back.¹ In the June 29, 2005, Award, Judge Benedict determined claimant was entitled to receive permanent disability benefits for a 54.2 percent permanent partial general disability, which

¹ It is unclear whether the date of accident is December 22, 2003, or December 23, 2003. The application for hearing filed with the Division of Workers Compensation by claimant on July 12, 2004, notes December 22, 2003, as the date of accident. The date of accident noted at the pre-hearing settlement conference and in the Award is December 23, 2003. The testimony and medical records indicate a date of accident of December 22, 2003. The parties use both dates in their briefs to the Board.

was based upon a 35.5 percent task loss and a 72.9 percent wage loss under the formula set forth in K.S.A. 44-510e. The Judge concluded claimant made a good faith effort to find employment. Therefore, the Judge used claimant's earnings from her present part-time job, or \$162 per week, in determining her wage loss.

Respondent contends Judge Benedict erred. Respondent argues claimant failed to prove she made a good faith effort to find employment. Accordingly, respondent contends the Board should impute a post-injury wage of at least \$310 per week for purposes of the permanent partial general disability formula and thereby reduce claimant's award of permanent disability benefits.

Conversely, claimant argues she has made a good faith effort to find employment. Consequently, claimant contends the Award should be affirmed.

The only issue before the Board on this appeal is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that the June 29, 2005, Award should be modified.

Respondent employed claimant to fill orders. On December 23, 2003, claimant injured her low back at work as she was lifting boxes and placing them onto a conveyor. Claimant reported her back problems to respondent and was referred for medical treatment.

Claimant continued working for respondent for a period of time following her accidental injury. A May 6, 2004, letter from respondent to claimant, which was introduced at the regular hearing, indicates claimant had been on leave of absence since April 2004.

In June 2004, claimant attempted to return to work for respondent but she only worked for two days before leaving because of back pain and blood pressure problems. And sometime in July 2004, claimant learned that she had been terminated.

Claimant's testimony is uncontradicted that in July 2004 she began looking for other employment after learning of her termination. At the regular hearing, claimant introduced a list of potential employers that she had contacted. The list contains the names of approximately 113 businesses. The list, however, neither displays the date that claimant contacted the business nor any other information. Nevertheless, there is no evidence contradicting claimant's testimony regarding her job search efforts.

In April 2005, claimant testified at the regular hearing that she was working part-time as a dispatcher for a taxi company where she had commenced working sometime in

December 2004. That job paid \$5.40 per hour but claimant only worked 25 to 35 hours per week. In April 2005, claimant was also receiving approximately \$170 to \$180 per week in unemployment benefits that were dependent upon her part-time earnings.

When asked at the regular hearing if she was continuing to look for appropriate employment, claimant testified she was. When asked what businesses she had recently contacted, claimant named two.

The record contains two expert medical opinions. The first expert medical opinion, which was presented by claimant's expert medical witness, Dr. Daniel D. Zimmerman, indicated claimant had permanently aggravated degenerative disc disease in her low back between the fourth lumbar and first sacral vertebrae (L4-S1). Dr. Zimmerman concluded claimant sustained a 14 percent whole person functional impairment as measured by the *AMA Guides*² (4th ed.) due to her December 2003 low back injury. The doctor also concluded claimant should limit her lifting to 20 pounds occasionally and 10 pounds frequently, and that she should avoid frequent flexing of the lumbar spine and avoid frequent bending, stooping, squatting, crawling, kneeling, and twisting.

The other expert medical opinion, which was provided by respondent's expert medical witness, Dr. Michael J. Poppa, indicated that claimant sustained a five percent whole person permanent functional impairment rating for a back strain but that she needed no medical restrictions as the strain had resolved.

In the June 29, 2005, Award, Judge Benedict found claimant had sustained a five percent permanent impairment of function to the whole person due to her December 2003 accident. Moreover, the Judge found claimant had lost the ability to perform 16 of her 45 former work tasks, or 35.5 percent, for purposes of the permanent partial general disability formula of K.S.A. 44-510e. No party has challenged those findings. Moreover, at oral argument the parties specifically agreed the only issue before the Board on this appeal was the amount of claimant's post-injury wage for purposes of determining her wage loss for the permanent partial general disability formula.

K.S.A. 44-510e provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent

² American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*³ and *Copeland*.⁴ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

If a finding is made that a good faith effort has not been made, the factfinder [*sic*] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁵

The Kansas Court of Appeals in *Watson*⁶ held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find appropriate employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder [*sic*] must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.⁷

³ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁴ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁵ *Id.* at 320.

⁶ *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

⁷ *Id.* at Syl. ¶ 4.

As indicated above, the parties did not challenge Judge Benedict's findings regarding claimant's whole person functional impairment or the task loss that claimant sustained due to her December 2003 low back injury. The Board adopts those findings as its own. Accordingly, claimant sustained a five percent whole person functional impairment under the *AMA Guides* (4th ed.) and a 35.5 percent task loss.

But the Board concludes claimant failed to prove she has made a good faith effort to find appropriate employment after she obtained her part-time job as a taxi dispatcher in December 2004. Although claimant contacted a number of businesses, there is no evidence when claimant contacted those companies, the type of work claimant was seeking, who claimant actually spoke to or met with, or whether she made any follow-up inquiries. The record is not entirely clear, but it appears claimant stopped looking for appropriate employment when she obtained the part-time job with the taxi company. As of the date of regular hearing, claimant had only contacted two businesses in the recent past.

The question of whether a worker has made a good faith effort to find appropriate employment is a question of fact to be decided on a case-by-case basis. The evidence fails to establish that claimant has made a good faith effort to find an appropriate job after she began working as a taxi dispatcher in December 2004. Consequently, a post-injury wage should be imputed to claimant commencing December 2004. And the only evidence regarding claimant's retained ability to earn wages is from her vocational expert, Dick Santner, who testified that claimant should be able to find work in the Junction City, Kansas, area earning approximately \$7 per hour, or \$280 per week. According to Mr. Santner, who is familiar with that area of the state, there are jobs available that would not violate Dr. Zimmerman's restrictions.

The parties stipulated claimant's average weekly wage for purposes of this claim was \$556.77 per week, excluding fringe benefits. The parties also stipulated claimant received additional compensation items of \$32.75 per week. Accordingly, from the date of accident on December 23, 2003, through April 30, 2004, which appears to be the date claimant's additional compensation items were terminated, claimant's pre-injury average weekly wage for purposes of the permanent partial general disability formula was \$556.77. But after claimant's additional compensation items were terminated, claimant's pre-injury average weekly wage increased to \$589.52.

The Board finds it is more probably true than not that, except for those weeks claimant missed work and drew temporary total disability benefits, claimant continued to earn her normal wages following the accident until she was placed on leave of absence sometime in April 2004. Accordingly, from the date of accident until the leave of absence on an unspecified date in April 2004 claimant earned at least 90 percent of her pre-injury wages and, therefore, her permanent partial general disability is limited to her five percent whole person functional impairment rating.

After April 2004 claimant had a 100 percent wage loss while she looked for other employment. Accordingly, from May 1, 2004, until claimant began working for the taxi company on an unspecified date in December 2004, claimant had a 100 percent wage loss and a 35.5 percent task loss, which produced a 68 percent permanent partial general disability. Consequently, for the period from May 1, 2004, through November 30, 2004, the Board concludes claimant is entitled to receive permanent disability benefits for a 68 percent permanent partial general disability.

As claimant has failed to prove she exerted a good faith effort to find appropriate employment after she began working part-time for the taxi company in December 2004, the Board imputes a post-injury wage of \$280 per week. Comparing the \$280 post-injury wage to \$589.52, the Board finds claimant sustained a 53 percent wage loss. Averaging that 53 percent wage loss with the 35.5 percent task loss yields a 44 percent permanent partial general disability commencing December 1, 2004.

Based upon the above, the June 29, 2005, Award should be modified to award claimant permanent disability benefits for a five percent permanent partial general disability, followed by a 68 percent permanent partial general disability, followed by a 44 percent permanent partial general disability.

AWARD

WHEREFORE, the Board modifies the June 29, 2005, Award entered by Judge Benedict, as follows:

Martha E. Anderson is granted compensation from Footlocker and its insurance carrier for a December 23, 2003, accident and resulting disability. Based upon an average weekly wage of \$556.77, Ms. Anderson is entitled to receive 13 weeks of temporary total disability benefits at \$371.20 per week, or \$4,825.60.

Based upon an average weekly wage of \$556.77, for the period ending April 30, 2004, Ms. Anderson is entitled to receive 5.43 weeks of permanent partial general disability benefits at \$371.20 per week, or \$2,015.62, for a five percent permanent partial general disability.

Based upon an average weekly wage of \$589.52, for the period from May 1, 2004, through November 30, 2004, Ms. Anderson is entitled to receive 30.57 weeks of permanent partial general disability benefits at \$393.03 per week, or \$12,014.93, for a 68 percent permanent partial general disability.

Based upon an average weekly wage of \$589.52, for the period commencing December 1, 2004, Ms. Anderson is entitled to receive 146.60 weeks of permanent partial

general disability benefits at \$393.03 per week, or \$57,618.20, for a 44 percent permanent partial general disability.

The total award is \$76,474.35.

As of December 5, 2005, Ms. Anderson is entitled to receive 13 weeks of temporary total disability compensation at \$371.20 per week, or \$4,825.60, plus 5.43 weeks of permanent partial general disability compensation at \$371.20 per week, or \$2,015.62, plus 83.43 weeks of permanent partial general disability compensation at \$393.03 per week, or \$32,790.50, for a total due and owing of \$39,631.72, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$36,842.63 shall be paid at \$393.03 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Michael P. Bandre, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director